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SUPREME COURT, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-168

FRED PARKER ANDERSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Fred Parker Anderson, defendant-appellant below, respectfully prays that a Writ of Certiorari issue to review the Order entered against him on June 1, 1972, by the United States Court of Appeals for the Sixth Circuit in the case of *United States of America* v. *Fred Parker Anderson* (No. 72-1127) affirming the judgment of the United States District Court for the Eastern District of Tennessee, Winchester Division, in *United States* v. *Anderson* (No. 1482).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported and is printed in the appendix hereto, infra, Appendix A. (p. A1)

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Whether in a criminal case, viewing the evidence in the light most favorable to the Government, circumstantial evidence must be such that a jury might reasonably conclude it is sufficient to exclude every reasonable hypothesis but that of guilt.

REASON CERTIORARI SHOULD BE GRANTED

Petitioner respectfully contends that certiorari should be granted as the Circuits are in disagreement on the above question.

CONSTITUTIONAL PROVISIONS RELIED UPON

Constitution of the United States, Amendment V:

> "No person shall be . . . deprived of life, liberty or property, without due process of law; . . . ."

STATEMENT OF THE CASE

The petitioner Anderson, along with Franklin D. Davis and Thurman Edward Jones, was indicted on January 6, 1971, in a one count indictment charging violation of Title 18 U.S.C. §2313, by receiving, concealing, storing and disposing of a motor vehicle which constituted interstate commerce from New Hope, Alabama, to Decherd, Tennessee, knowing the vehicle to be stolen.

Petitioner Anderson's case was severed from that of Franklin D. Davis. Defendant Thurman Edward Jones' charges were dismissed on July 14, 1971. Trial was had by jury before the U. S. District Court for the Eastern District of Tennessee, Winchester Division, on July 15, 1971. At the close of the government's proof, oral motion was made for entry of a judgment of acquittal which the Court considered and overruled.

The jury found the petitioner guilty as charged in the indictment.

Petitioner was sentenced on October 14, 1971, to three years in the custody of the Attorney General and on condition that the defendant be confined in a jail type or treatment institution for a period of four (4) months, the execution of the remainder of the sentence of imprisonment is suspended and the defendant placed on probation for two years.

Petitioner appealed the case to the Sixth Circuit Court of Appeals at Cincinnati which Court affirmed the judgment of the United States District Court on June 1, 1972.

STATEMENT OF THE FACTS

On or about December 6, 1970, a 1971 Ford F-100 pick-up truck, light green in color, with a shell camper was stolen from the residence of Mr. and Mrs. Cagle in New Hope, Alabama.

On December 8, 1970, Sheriff Braswell of Franklin County, Tennessee, was called concerning a stripped truck in his county. The next morning with two FBI agents he went up to Little Mountain near the home of co-defendant Franklin D. Davis and observed Davis and co-defendant Jones in a truck owned and driven by Jones with a motor suspended from a winch along with a battery.

Other parts of the truck later identified as the Cagle's missing truck were found at Jones' residence in a truck belonging to Franklin D. Davis. The truck bed was discovered in Davis' garage.

The proof linking petitioner Anderson to the crime is as follows:

Thurman Jones claimed that Davis picked up a battery which he identified as a Delco at appellant's shop and on the day they were arrested, Jones and Davis stopped at a service station and he heard petitioner tell Davis he better go get the motor. (App. B, p. A3) No particular motor was ever mentioned. (App. B, p. A3) They were already on the way to get the motor in question before this conversation.

A Mrs. Steele who lived across the road from Davis saw a truck with a camper on the back of it in Davis' possession some time in December, 1970, but she didn't know whether it was before or after Christmas. The petitioner Anderson came along later after the truck was placed in Davis' garage. (App. B, p. A2)

Adolf K. Robertson stated that he had been at Anderson's shop and Anderson told him a camper was for sale. It was on a green truck with Alabama tags. (App. B, p. A4) Later he paid a tall sandy haired boy $100 for the camper. (App. B, p. A6) Petitioner later called him and told him he had found out the camper was stolen and that he might want to do something with it. (App. B, p. A7)

Anderson never claimed to have any ownership in the camper. (App. B, p. A7)

Paul McDaniel, a high school student, testified that petitioner had given him a Philco radio in December of 1970. The radio was never shown to have come from the

truck although Philco is a Ford product and found in Ford vehicles.

ARGUMENT

In the case of *Holland* v. *U. S.*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150, the Supreme Court attempted to deal in part with the problem of circumstantial evidence in criminal cases. The *Holland* case, above cited, was an income tax evasion case, wherein the appellant-defendant, among other grounds, challenged the failure of the Trial Court to charge the jury that where the Government's evidence is circumstantial, it must be such as to exclude every reasonable hypothesis other than that of guilt. Petitioner makes no attack upon such holding by the Court in the 1954 *Holland* case. However, petitioner does contend that where in a case of circumstantial evidence the evidence is such that a jury might not reasonably conclude that the Government has excluded every reasonable hypothesis but that of guilt, the defendant is entitled to a verdict of acquittal. The several Circuits are in disagreement on the above question. The Fifth and Ninth Circuits are favorable. *U. S.* v. *Garza*, 426 F.2d 949 (5th Cir., 1970), and *Urquidi* v. *U. S.*, 371 F.2d 654 (Cert Den'd), *Perez* v. *U. S.*, 88 S.Ct. 111, 389 U.S. 879, 19 L.Ed.2d 171 and 88 S.Ct. 112, 389 U.S. 879, 19 L.Ed.2d 171 (9th Cir., 1967).

The Second, Fourth, Sixth and Tenth Circuits have held *contra*. *U. S.* v. *Grunberger*, 431 F.2d 1062 (2nd Cir., 1970), *U. S.* v. *Mullen*, 278 F.Supp. 410 (affirmed), 416 F.2d 456 (4th Cir., 1967), *U. S.* v. *Prieur*, 429 F.2d 1237 (6th Cir., 1970), and *U. S.* v. *Turner*, 421 F.2d 252 (10th Cir., 1970).

It would seem most reasonable to petitioner that in those cases in which a jury may not reasonably conclude

from the evidence that the Government has excluded every reasonable hypothesis but that of guilt, the defendant should be given the benefit of such failure on the Government's part and should be entitled to a verdict of acquittal.

The petitioner in this case was convicted purely upon circumstantial evidence, and the Government's proof could, under no stretch of the jury's imagination, even taken in the light most favorable to the Government, have excluded every reasonable hypothesis but that of guilt.

The only evidence against the petitioner is:

1. He said something to Davis about an unnamed motor. (App. B, p. A2)

2. He was at Davis' house at the same time as a pickup truck and camper. (App. B, p. A2)

3. He advised witness Robinson of a camper for sale and later stated he found out it was stolen. (App. B, p. A7)

4. He gave a Philco radio to a high school student.

The petitioner, through his counsel, made a motion for judgment of acquittal which the Trial Court overruled. Petitioner, therefore, maintains that the proof in this case did not meet the required standard. The four points set out above on which the jury would have had to find Anderson guilty may be reasonably explained as follows:

(a) The mention of the motor. No specific motor was ever mentioned and Anderson ran a garage and body shop. (App. B, p. A3) Thus, his mention of a motor was not unusual. Davis and Jones were already on their way to get the motor in question.

(b) Anderson's presence at Davis' home at same time as a truck with camper. They did not come together but Anderson came later. They knew each

other obviously and there is no proof Anderson touched the truck, or knew of its stolen origin.

(c) The camper incident with Robertson. Anderson never claimed ownership nor did he get any money. His notifying Robertson when he learned the camper was stolen is no evidence of guilt. (App. B, p. A7)

(d) The gift of the radio. The radio in question was never linked to the truck except that it too was a Ford product. Many thousands of these radios are bought and sold every year. There is no proof as to exactly when this took place so as to show it could have been out of the truck. All the witness knew was that it was some time in December, 1970.

CONCLUSION

Petitioner respectfully contends that applying the proper constitutional standard to the evidence in this case, a jury might not reasonably conclude that the Government had excluded every reasonable hypothesis but that of guilt. Therefore, the verdict of the jury should be reversed and the charges dismissed.

Respectfully submitted,

.....

DALE QUILLEN,
Attorney for Petitioner

APPENDIX A

No. 72-1128

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANKLIN D. DAVIS,
Defendant-Appellant.

Order

(Filed June 1, 1972)

Before:

PHILLIPS, Chief Judge, MILLER, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge.

Appellant was convicted in the court below for a Dyer Act violation under 18 U.S.C. Sec. 2313 involving a pickup truck which was stolen in New Hope, Alabama and transported to Franklin County, Tennessee.

The only issue on appeal involves the sufficiency of the evidence to connect the appellant with the alleged offense.

Without detailing the material facts, the Court has carefully examined the record and is of the opinion that there is material and sufficient evidence in the record to sustain the verdict of the jury and the judgment of conviction.

It is accordingly ORDERED and ADJUDGED that the judgment of the United States District Court for the Eastern District of Tennessee in this action be and the same is hereby affirmed.

Entered by Order of the Court.
/s/ James A. Higgins
Clerk

APPENDIX B

Excerpts from Transcript of Testimony

[15] BY MR. QUILLEN:

Q. That particular radio there, is it any different from any other radio that might be installed on a 1971 Ford pickup truck? A. I don't think so.

Q. It is the same thing, is it not? A. Same thing.

Q. It is also the same type radio that was installed on the 1970 model and other models, as far as you know? A. I don't know about that. I never had a '70 model.

Q. But, there are no peculiar characteristics of that [16] radio which you can identify? A. No, not like that.

MR. QUILLEN: That is all.

* * *

[23] Q. What, if anything, was being done to this truck, or with this truck? A. I really don't know. All I know, Mr. Davis drove the truck in and later Mr. Anderson come in and they backed the truck in the garage. And the next morning the camper was on the outside.

* * *

[26] Q. And so far as the man you have identified as Mr. Anderson having any—doing anything to the truck, you didn't see that, did you? A. No, sir, huh-uh.

* * *

[29] Q. Well, just tell the Court and jury what you did after Mr. Davis came to your house? A. Mr. Davis came to my house and asked me would I go and pick up a car motor, the way he put it, and bring it to Decherd. He didn't have any way to lift it. I told him I would.

Q. Bring it to Decherd? A. Bring it to Decherd.

Q. Did you go with him? A. Yes, sir.

Q. Did you have a truck with a hoist on it? A. Yes, sir, I had a truck, pickup truck, with a small hoist.

Q. Were you employed during that period of time, Mr. Jones? A. No, sir, I wasn't, no, sir.

Q. And why were you unemployed, if you were? A. Well, I had been in the hospital.

Q. All right, and did you take your truck then with the hoist? [30] A. Yes, sir.

Q. Where did you go with it? A. Well, first, I went to—I stopped in Decherd, the first stop I made.

Q. Why did you stop in Decherd? A. I stopped at a service station in Decherd. Mr. Davis saw Mr. Anderson.

* * *

[31] Q. Did you see—you say you saw Mr. Anderson there. Did you hear anything that Mr. Anderson said to Mr. Davis? A. He just came up and spoke to Mr. Davis.

Q. Did he say anything about a motor? A. Yes, sir, he said something about going and getting a motor, I didn't pay too much attention. My truck was still running. I didn't want to cut it off.

* * *

[32] Q. What, specifically, as best you can remember did Mr. Anderson say when you stopped there at the station about a motor? A. He asked Mr. Davis to go get the motor.

Q. What did he tell him to do with it? A. He didn't—I don't recall him saying anything about what to do with it. Just told Mr. Davis he better go get the motor.

* * *

[38] Q. You say again you don't know what motor they were talking about? A. No, sir, I couldn't say.

* * *

[42] Q. What kind of work does Mr. Anderson do? A. Body work and mechanical work.

Q. Does he own a garage or shop of some sort? [43] A. Yes, sir.

Q. Where is his shop located? A. In Decherd in front of the City Hall.

* * *

Q. All right, did you see any trucks there at his [44] business during that time, Mr. Robertson? A. Well, I went over to look at my truck to see how it was coming out. The bed didn't look too well. So, I said, well, if I had a camper top on top of it it would cover the inside of the bed up.

He said, "There is a boy that's got one out there he wants to sell."

MR. QUILLEN: I didn't understand the answer.

THE COURT: Can you speak louder Mr. Robertson?

THE WITNESS: He said a boy had one outside he wanted to sell.

Q. Said a boy had one outside. Had you seen a camper there? A. Not then, I didn't.

Q. Did you go look at one? A. I went and looked at it.

Q. Where was it? A. It was setting out kind of—the alley runs in front of his shop, and setting down, I guess it was in the alley, city property, probably. Just below the shop.

Q. Was the camper on something? A. On the truck.

Q. What kind of truck was it on? A. Ford.

Q. What color was it? [45] A. Green.

Q. Do you remember? A. Green.

Q. What kind of tags? A. Alabama.

Q. Was there any boy around or about this truck? A. No, sir.

Q. Did you discuss buying this camper with anybody? A. No.

Q. Or did you talk about the price of the camper? A. I asked Buck what the boy wanted for it. He said a hundred and fifty dollars. I said, "That is too much." I said,

"I can buy a new one for a hundred and sixty five or seventy five, something like that."

Q. Did you discuss with Mr. Anderson whether or not this camper was stolen? A. I asked him if the camper had been stolen. He said—

Q. Why did you ask him that? A. I just wondered why the boy would be wanting to see it off a new truck.

MR. QUILLEN: Let him finish his answer.

THE MARSHAL: Mr. Quillen, would you stand when you make an objection.

THE COURT: What is the problem?

[46] MR. QUILLEN: He started to make some additional answer and he was interrupted, as I recall, by another question. I wanted him to complete his answer.

THE COURT: Have you answered all the questions that was asked you completely?

THE WITNESS: I don't remember what he is referring to.

THE COURT: All right, you can bring it up on cross-examination.

Q. And what, if anything, did he tell you about whether or not this camper was stolen when you told him that? A. He said he was sure it was all right.

Q. Did you buy the camper from him, Mr. Robertson? A. No, sir. Well, I didn't buy it then. Then I made him an offer of a hundred dollars.

Q. Who did you make that offer to? A. To Mr. Anderson. He said, "In don't think he will take that." I said, "Well, I am not interested in it anyway."

It drifted along the rest of the day, and just before about three o'clock he called me and said the boy decided to sell it.

Q. He called you? Who do you mean by "he"? A. Mr. Anderson.

Q. All right, and what did he say the boy wanted for [47] it at that time? A. He said he decided to take my hundred dollars that I had offered for it.

Q. All right, and was there any discussion by Mr. Anderson about whether this would be cash or check or— A. Seems like I asked him if he would take a check and he said he didn't know, but the boy—he said the boy was coming by the lot after the money. The boy came by the lot and I was busy.

Q. What did the boy look like that came by? A. He is kind of tall, sandy haired.

Q. Have you ever seen him before or since? A. No.

Q. Was he in any kind of automobile when you came by? A. In a green 1964 Chevrolet four-door.

Q. What kind of tags did it have on it? A. Alabama.

Q. And how long after you talked to Mr. Anderson about selling—or the hundred dollars being paid, was it when this person came by, how long after that was it? A. Just five or ten minutes, just shortly.

Q. Did you give him one hundred dollars? A. Yeah.

Q. Cash? A. Yes.

[48] Q. Where was the camper then? A. It was—well, I assumed it was still on the truck at the shop. I hadn't been over since.

Q. How many days had it been since you actually saw it on the truck? A. That morning.

Q. That morning? A. Uh-huh.

Q. When did you next see the camper? A. When they brought it to the lot.

Q. When would that have been, sir? A. That was on Wednesday morning when he brought it to the lot.

Q. How many days after you bought it would that have been when you next saw it? A. I believe it was the next day. I am not sure, but I think it was the next day.

* * *

[49] Q. What prompted you, or how did you come to know about this camper and get in touch with Sheriff Braswell? A. Sheriff Braswell got in touch with me and called me.

Q. Prior to that, had you talked to Mr. Anderson about the camper again? A. He called me a minute before the Sheriff and told me he found out the camper was stolen—might want to do something with it.

Q. Said what? A. Said I might want to hide it or get rid of it. I said, "No, I will take it to the Sheriff."

Q. Did you say anything to him about him taking it? [50] A. I asked him if he wanted to come get it.

Q. What did he say to this? A. He said no.

Q. Is that all he said? A. (No reply by the witness)

Q. Then, you turned it over to Sheriff Braswell? A. A few minutes after that the Sheriff called me and asked me if I would come over there. And I asked him if that is what it was about.

* * *

[51] Q. And Mr. Anderson told you, did he not, that the owner of the truck and camper was at the garage and that he [52] would accept the hundred dollars? A. Yes, sir.

Q. And did he not also tell you, or was not—you saw the man who purportedly was the owner who came to your place in a 1964 green Chevrolet, is that right? A. Yes, sir.

Q. Would you describe that man? A. He was tall and kind of sandy headed is about all I remember about it.

Q. In any event he was not Fred Anderson? A. No.

Q. And of course that man, whoever he was, represented himself as being the owner of the trailer (sic) that you purchased? A. Yes, sir.

Q. Where was it—where was the camper delivered to you? A. To my lot.

Q. I beg your pardon? A. It was on the truck and delivered to the lot.

Q. Do you know that the camper that was delivered to you was the one you had seen down at Mr. Anderson's place? A. No.

* * *

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-168

FRED PARKER ANDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted of violating 18 U.S.C. 2313 by receiving, concealing, storing, and disposing of a pickup truck in interstate commerce, knowing that the truck had been stolen. He was sentenced to three years' imprisonment, with sentence suspended and two years' probation imposed on condition that he be confined four months. The court of appeals affirmed (Pet. App. A 1).

1. The sole issue raised is the sufficiency of the evidence to support the conviction. The evidence at trial

showed that on December 6, 1970, a light green 1971 Ford pickup truck and an attached camper, bearing an Alabama license plate, were stolen from their owner in Alabama (Tr. 5-8). On December 8, 1970, the sheriff covering Decherd, Tennessee, was notified that a stripped pick-up truck had been abandoned on a roadside (Tr. 17). The frame bore the identification number of the stolen vehicle (Tr. 61, 11). A subsequent search of the premises of petitioner's co-defendant, Franklin Davis,[1] turned up various parts of the Ford pickup truck (Tr. 20, 60, 63) which were later identified by the owner (Tr. 13).

The evidence established that on a day in early December, 1970, petitioner, who operated a garage in Decherd, Tennessee, showed a customer a light green pickup truck with Alabama tags with a camper on the rear. Petitioner said a boy wanted to sell the camper (Tr. 42-44) separately from the truck. The customer offered $100 which petitioner later telephoned was acceptable. The camper was delivered the next day (Tr. 46, 48). Late that evening, petitioner told the buyer that the camper had been stolen and advised him to get rid of it (Tr. 49). The buyer turned it over to the sheriff (Tr. 49). It was identified by the owner (Tr. 14-15), as the pickup truck had been.

There was also evidence from which the jury was entitled to find that the camper had been dismantled from the pickup truck, prior to its delivery, by petitioner and Franklin Davis. (Tr. 22, 23, 24, 39-40, 42-43). In early December, a neighbor of Davis saw the petitioner and

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[1] Davis was separately tried and convicted.

Davis back a green Ford pickup truck with camper attached into Davis's garage and then heard banging noises. The following morning the camper was lying on the ground outside the garage (Tr. 23).[2]

Petitioner, when contacted during the F.B.I. investigation, stated that he knew nothing about a stolen truck, and denied any knowledge of a camper or having been involved in any deal with a truck (Tr. 65).

2. Petitioner contends that the evidence of his guilt was legally insufficient to sustain his conviction. He argues that in a case resting "purely upon circumstantial evidence," the government must "exclude every reasonable hypothesis but that of guilt." We submit that the evidence here was sufficient to satisfy that standard. But in any event it is settled that even in a circumstantial evidence case the government need not "exclude every reasonable hypothesis but that of guilt." In *Holland* v. *United States,* 348 U.S. 121, 139-140, the Court held that this formulation was inappropriate for a jury instruction. It is even less appropriate as a standard of appellate review where the record is examined "not for the purpose of weighing the evidence but only to ascertain whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict." *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 254. Since the *Holland* decision, all the courts of appeals have aban-

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[2] When the pickup truck was recovered by the sheriff its "Philco" radio was missing (Tr. 9). A "Philco" radio identical to that which belonged in the stolen pickup truck was traced to one Paul McDaniel (Tr. 54-55, 13). McDaniel testified that petitioner had given him the radio.

doned this circumstantial evidence formula which petitioner advances.[3] While the Fifth Circuit for some time after *Holland* adhered to that formula, it is now "in agreement with * * * other circuits that whether the evidence be direct or circumstantial, the matter of the defendant's guilt is for the jury to decide unless the court concludes that the jury must necessarily have had a reasonable doubt." *United States* v. *Warner,* 441 F. 2d 821, 825 (C.A. 5).[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

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[3] See, *e.g., Dirring* v. *United States,* 328 F. 2d 512 (C.A. 1), certiorari denied, 377 U.S. 1003; *United States* v. *Aadal,* 368 F. 2d 962 (C.A. 2), certiorari denied, 386 U.S. 970; *United States* v. *Boyle,* 402 F. 2d 757 (C.A. 3), certiorari denied, 394 U.S. 934; *United States* v. *Chappell,* 353 F. 2d 83 (C.A. 4); *United States* v. *Prieur,* 429 F. 2d 1237 (C.A. 6); *Sablan* v. *People of Territory of Guam,* 434 F. 2d 837 (C.A. 9) *United States* v. *Turner,* 421 F. 2d 252 (C.A. 10); *United States* v. *Kye,* 411 F. 2d 120, 122 (C.A. 8).

[4] Petitioner's claim that "several Circuits are in disagreement" on the issue (Pet. 5) is based upon decisions which have either been expressly or implicitly rejected in subsequent cases. Compare *United States* v. *Garza,* 426 F. 2d 949 (C.A. 5), and *Urguidi* v. *United States,* 371 F. 2d 654 (C.A. 9), certiorari denied, 389 U.S. 879, cited by petitioner (Pet. 5), with *United States* v. *Warner,* 441 F. 2d 821, 825 (C.A. 5), and *Sablan* v. *People of Territory of Guam,* 434 F. 2d 837 (C.A. 9).

☆ U.S. Government Printing Office: 1972—476-667/166